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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

No. 1524

GARRETT MORRIS AND THE MORRIS PLAN LIFE INSURANCE COMPANY, *Petitioners*

vs.

O. P. LEONARD, TRUSTEE OF THE TRUST ESTATES OF OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, AND MARTHA JANE LEONARD, AND J. M. LEONARD, MARY LEONARD, AND O. P. LEONARD, CO-TRUSTEES OF THE TRUST ESTATES KNOWN AS MARY LEONARD TRUST NO. 2, MIRANDA LEONARD TRUST NO. 2, MARTHA LEONARD TRUST NO. 2 AND MADELON LEONARD TRUST, RESPONDENTS, AND OBIE PAUL LEONARD, ROBERT WOOLRIDGE LEONARD, MARGERY ANN LEONARD, MARTHA JANE LEONARD, MARY LEONARD, MIRANDA LEONARD TRUST, MARTHA LEONARD TRUST, AND MADELON LEONARD TRUST, INTERVENORS *Respondents*

Brief In Opposition to Petition for Writ of Certiorari to the Court of Civil Appeals For the Second Supreme Judicial District of Texas

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The above-named Respondents hereby reply to the Petition for Writ of Certiorari filed herein.

JURISDICTION

The Honorable Supreme Court of the United States does not have jurisdiction of this cause. There is no federal question involved. Petitioners contend that they have been deprived of a trial. In fact, however, Petitioners have already had a trial on the identical cause of action now being asserted by Petitioners. The cause of action asserted by Petitioners was tried in the 17th Judicial District Court of Tarrant County, Texas, where judgment was entered for Respondents and against Petitioners on July 30, 1968. The Court of Civil Appeals for the Second Supreme Judicial District of Texas affirmed the judgment on May 16, 1969, and the Supreme Court of Texas, on November 17, 1969, refused Petitioners' Application for Writ of Error, "no reversible error." Petitioners did not petition to the Supreme Court of the United States for Writ of Certiorori with respect to the judgment rendered on July 30, 1968.

QUESTION PRESENTED

The question presented in this case is not, as Petitioners state, whether a citizen involved in a contract dispute is entitled to a trial. Petitioners have already had a trial wherein the dispute was resolved and, on July 30, 1968, Judgment rendered for Respondents and against Petitioners. No further appeal lies from that Judgment. There is no legitimate question for determination by The Supreme Court of the United States.

STATEMENT OF THE CASE

Garrett Morris and Morris Plan Life Insurance Company, hereinafter referred to as "Petitioners," originally instituted Cause No. 48, 411-C in the 17th Judicial District Court of Tarrant County, Texas, against various trusts created by O. P. Leonard and Marvin Leonard, and against various individual members of the Leonard family, all hereinafter referred to as "Respondents." In general Petitioners complained that a building, which comprised part of the assets of a corporation whose stock was sold by the Respondents to Petitioners in 1955, did not have the value allegedly promised or represented by Respondents. Respondents counterclaimed for recovery of the balance due on certain notes given for the purchase price of the stock.

After a trial lasting approximately a week, the Trial Court withdrew the case from the jury and entered judgment for Respondents on their counterclaims and against Petitioners with respect to their claim for damages. Judgment of the Trial Court was affirmed by the Texas Court of Civil Appeals. Petitioners appealed the decision of the Court of Civil Appeals, and Petitioners' Application for Writ of Error to the Texas Supreme Court was refused, no reversible error.

After Petitioners' Application for Writ of Error was refused by the Texas Supreme Court, Petitioners filed a petition entitled "Bill of Review" in Cause No. 48, 411-C in the 17th Judicial District Court of Tarrant County, Texas. Petitioners sought to set

aside the judgment for Respondents and against Petitioners. Basically, as grounds for their "Bill of Review," Petitioners alleged newly discovered evidence. Respondents filed an "Answer to Bill of Review" and a Motion for Summary Judgment supported by all the prior proceedings in this Cause No. 48, 411-C. Petitioners filed a Reply to the Motion for Summary Judgment filed by Respondents, and Petitioners filed a Counter-Motion For Summary Judgment. A hearing on the respective motions for summary judgment resulted in a rendition by the Trial Court of a summary judgment in favor of Respondents, that Petitioners take nothing by reason of their Bill of Review, and overruling Petitioners' motion for summary judgment. The Texas Court of Civil Appeals affirmed. Petitioners again appealed the decision of the Court of Civil Appeals, and Petitioners' Application For Writ of Error to the Texas Supreme Court was again refused, no reversible error.

An abbreviated version of the facts appears below. The Statement of Facts prepared for the initial trial of this cause, and the exhibits introduced at that trial were attached to Respondents' Motion For Summary Judgment in the second proceeding. Reference will thus be made to portions of the Statement of Facts ("S.F.") and to the exhibits.

A.

Respondents' Acquisition of Insurance Building in Trade With Service Life Insurance Company

In 1953, Service Life Insurance Company of Fort Worth, Texas, ("Service Life") conveyed the Insurance Building to Respondents and received thereby a credit of one million dollars on the purchase price of certain other property conveyed by Respondents to Service Life. (S. F. 309-311; 432; 499).

B.

Sale of Insurance Building to Sloans and Bledsoe

In contemplation of the trade with Service Life, Respondents contracted to sell the Insurance Building to Harry Sloan, Harlan Sloan and Edward Bledsoe for $873,750. (Pl. Exs. 1, 2). The Sloans and Bledsoe contemplated sale of the Insurance Building to a newly organized insurance company, Chiro Life Insurance Company ("Chiro"). A provision of the sales contract between Respondents and the Sloans and Bledsoe was as follows:

> "This contract is specifically conditioned that *the Purchasers* will forthwith diligently proceed to procure from the State Insurance Commissioner, approval of the Insurance Department for the capitalization by the proposed Life Insurance Company who will own the building, at a minimum of $900,000, capital value, and will present said subject to the life Insurance Department and will endeavor to secure approval of such capitalization figure for the property during the week beginning March 23, 1953, and *if the*

> *Purchasers are unsuccessful* in obtaining approval of such minimum capitalization figure, then *at the election of the Purchasers*, this contract may be null and void, if same is not obtained on or before the 10th day of April, 1953." (Emphasis Added.)

The then Commissioner of Insurance, George Butler, approved the capitalization of the Insurance Building in Chiro at $950,000, and the purchase of the Insurance Building by the Sloans and Bledsoe was consummated. (S. F. 388; Pl. Ex. 10). The Sloans and Bledsoe then conveyed the Insurance Building to Chiro. (S. F. 99) A deferred purchase price was represented by deed of trust note executed by Chiro, payable to Respondents in amount $650,000, and a personal note executed by the Sloans and Bledsoe, payable to Respondents in amount $98,750. The Sloans and Bledsoe pledged to Respondents their shares in Chiro as security for payment of the $98,750 note. (Pl. Exs. 4, 5 and 6). Commissioner Butler died, and the new Commissioner of Insurance, Garland Smith, refused to honor Butler's commitment to approve a $950,000 valuation. Smith approved only a valuation of $873,750. (S. F. 386-387). The Sloans and Bledsoe, and Chiro, then reconfirmed and ratified their purchase of the Insurance Building in spite of the reduced approved valuation. Chiro Life received its license as an insurance company on January 13, 1954, after the Sloans had filed a certified balance sheet with the Texas Insurance Commission on January 12, 1954, reflecting "The Building at Insurance Commission appraised value of $873,750." (Def. Exs. 3, 4). Chiro

then occupied the Insurance Building for several months but made no payments on the deferred purchase price therefor. (S. F. 42; 85).

C.

The Sale of Chiro Stock to Petitioners

Upon default by Chiro in paying Respondents the deferred purchase price for the Insurance Building, Respondents effected a voluntary foreclosure of their lien on the Chiro stock, and Respondents turned over the operation of Chiro to Petitioner Garrett Morris, as Trustee for Respondents. (S. F. 182-186; 188). Petitioner Garrett Morris operated Chiro for six months, as Chiro's sole executive officer, then decided to purchase the Chiro stock from Respondents. The Petitioner Garrett Morris merged Chiro with Petitioner Morris Plan Life Insurance Company, of which he was President and majority shareholder. (S. F. 195; Pl. Ex. 14). Pursuant to the terms of the agreement for Petitioners to acquire the Chiro stock, Respondents reduced the amount of the deferred purchase price for the Insurance Building, and Morris Plan executed a note for the reduced amount, $550,000, and a Deed of Trust on the Insurance Building securing the note. (Def. Exs. 18, 19).

In 1956, the Commissioner of Insurance further reduced the approved valuation of the Insurance Building to $700,000 pursuant to a new appraisal thereof. (S. F. 212-213). In 1957 Petitioners obtained a new approved valuation of $750,000. Knowing that the approved valuation had been reduced, Petitioners

executed notes in renewal of the deferred purchase price, in 1956 and in 1962. (S. F. 221-222; Def. Exs. 31a, 31b, 32). As a result of these renewal notes, the deferred purchase price was represented by the $550,000 note executed by Morris Plan; a $150,000 note executed in 1956 by Garrett Morris, personally, in exchange for a credit of $150,000 on the Morris Plan $550,000 note; and a $75,000 surplus debenture executed in 1962 by Morris Plan in exchange for an additional $75,000 credit on the $550,000 note. (S. F. 221-222; 350; Def. Exs. 20, 21, 22, 23, 31a, 31b, 32).

D.

The First Case

On April 25, 1967, fourteen (14) years after Petitioners acquired the Chiro stock from Respondents, Petitioners instituted suit against Respondents for damages and for cancellation of Petitioners' notes in original amounts $550,000, $150,000 and $75,000. Respondents counterclaimed for judgment for the unpaid balances due on the notes and for foreclosure of the deed of trust covering the Insurance Building.

Petitioners complained in the first case, because the approved valuation of the Insurance Building had been reduced by the Insurance Commissioner. Petitioners' theories, set out in "Plaintiffs' Fifth Amended Petition", and in "Plaintiffs' First Amended Original Answer to Defendants' Second Amended Counterclaim", were:

> (1) Respondents had breached an implied covenant of warranty of value of the Insurance

Building when Respondents sold the Building to the Sloans and Bledsoe. Petitioners claimed that as successors in the chain of title to the Sloans and Bledsoe, Petitioners were entitled to damages for breach of the alleged covenant.

(2) The notes executed by Petitioners were illegal, because they were in renewal of a note executed by Chiro for its purchase of the Insurance Building. The note executed by Chiro was illegal, because Chiro allegedly paid too much for the Insurance Building.

(3) The notes executed by Petitioners were not enforceable because there had been a failure of consideration.

(4) The notes executed by Petitioners were unenforceable because their execution had been induced by false representations as to the value of the Insurance Building made by Respondents at the time that Petitioners had acquired the Chiro stock.

(5) The notes executed by Petitioners were unenforceable because an unsatisfied condition precedent to liability thereon, that the Insurance Commissioner approve a valuation of $900,000, was stated in the contract of sale between Respondents and the Sloans and Bledsoe.

In reply to the contentions of Petitioners, Respondents denied the factual allegations of Petitioners and plead waiver, estoppel, compromise and settlement, ratification, release and the two and four year limitation statutes. ("Defendants' Third Amended Original Answer and Counterclaim"; "Defendants' First Supplemental Pleading in Response to Plaintiffs' First

Amended Original Answer to Defendants' Counterclaim")

On July 30, 1968, after hearing all the evidence, the Trial Court withdrew the case from the jury and rendered judgment that Petitioners take nothing and that Respondents recover judgment on the notes executed by Petitioners. The Court of Civil Appeals affirmed the Trial Court, holding as a matter of law that (i) the original transaction wherein the Respondents sold the Insurance Building to the Sloans and Bledsoe was not illegal; (ii) the notes executed by Petitioners were not illegal; (iii) Respondents had committed no fraud in the transaction wherein Petitioners acquired the Chiro stock; (iv) Petitioners were estopped to assert their claims based on the value of the Insurance Building; and (v) Petitioners had no standing to complain of the original transaction between Respondents and the Sloans and Bledsoe. *Morris v. Leonard*, 441 S. W. 2d 877 (Tex. Civ. App. 1969, writ Ref., n.r.e.). Application for Writ of Error filed by Petitioners was refused by the Supreme Court of Texas, "no reversible error." Petitioners did not seek Writ of Certiorari to the United States Supreme Court after final adjudication of the first case by the Texas courts.

E.

Petitioners' "Bill of Review"

On November 27, 1968, after the Trial Court had rendered judgment in the first case, Morris Plan was placed in receivership. On September 12, 1969, the

statutory receiver expressed his opinion that the "highest realistic sales price" which could be obtained at that time for the Insurance Building owned by Morris Plan "would not exceed $200,000," and that "it thus appeared that the sum of $200,000 was the maximum actual value of this property to the receivership estate." (Ex. B, Respondents' Response to Petitioners' Motion for Summary Judgment).

Petitioners then filed a pleading entitled "Bill of Review" apparently making the contention: that the opinion of the Receiver in September, 1969, that the Insurance Building *in September, 1969*, had a value of $200,000 constitutes "new evidence" that the Building *in 1954* had a value not exceeding $200,000 and constitutes "new evidence" that the prior Insurance Department approval of a $750,000 valuation was not final. Petitioners then argued that this "new evidence" conclusively shows that all parties were mistaken at the time of trial as to the value of the Insurance Building in 1954 and were mistaken as to the finality of the previously approved valuation of the Building at $750,000. Petitioners contended that this "new evidence" and "mutual mistake" entitled Petitioners to a new trial.

The Trial Court granted Respondents' Motion for Summary Judgment that Petitioners take nothing by reason of their "Bill of Review," the Texas Court of Civil Appeals affirmed, and Petitioners' Application for Writ of Error was refused by The Supreme Court of Texas, no reversible error.

Petitioners by their Petition for Writ of Certiorari

have seemingly adandoned their quest for relief by bill of review and maintain they are bringing suit on an entirely new cause of action for "new injury." Of course, Petitioners may not properly replead their case in this Court. It is clear, however, that Petitioners are not asserting a new cause of action and also are not entitled to relief via the bill of review route.

ARGUMENT

A.

The Texas Courts Properly Held As a Matter of Law That Petitioners Were not Entitled to Relief Via Bill of Review.

A new trial will not be granted because of newly-discovered evidence unless the following facts appear:

1. The evidence has come to the knowledge of the applicant since the trial;

2. The evidence could not have been discovered at or prior to the time of trial by the exercise of diligence;

3. The evidence is not merely cumulative;

4. The evidence is certain, decisive and so material to the just decision of the case as to be calculated to change the result of the case;

5. The evidence is not for the purpose of impeachment.

In *New Amsterdam Casualty Company v. Jordan*, 359 S. W. 2d 864 (Tex. 1962), the Texas Supreme Court quoted with approval at 359 S. W. 2d 866:

" 'A new trial will not be granted on the ground

> of newly-discovered evidence, unless it is made to appear that it has come to the knowledge of the applicant since the trial; that it could not have been sooner discovered by the exercise of diligence; that it is not merely cumulative; that it is not for the purpose of impeachment.' Conwell v. Gulf, C.&S. F. Ry. Co., 85 Tex. 96, 19 S. W. 1017 (1892)."

The same rules apply to bills of review as to motions for new trial. As stated in *Kelley v. Wright*, 184 S. W. 2d 649 (Tex.Civ.App. 1944, aff'd. 188 S. W. 2d 983), at 184 S. W. 2d 654:

> "A liberal application of the rules of equity demands that the same principle involved by a motion seasonably filed for new trial on grounds of newly discovered evidence, at the term of court at which a judgment was rendered be applied to belated motions partaking of the nature of equitable bills of review.
>
> "The recognized rule in the former class of motions seems to be that much discretion is given to the trial court in passing upon the issues and unless there appears an abuse of discretion his ruling will not be disturbed. 25 Tex.Jur. 590 sec. 188. In 31 Tex.Jur. 104, sec. 92, this is said: 'If the (newly discovered) evidence is circumstantial it should be of a conclusive tendency, or at least ought very satisfactorily to establish the fact sought to be proved. ***' Ibid, 196 sec. 94, it is said: 'But the court should deny the motion if the evidence alleged therein is uncertain and inconclusive in character, of slight probative value, or probably untrue.' "

The evidence relied upon by Petitioners does not meet the tests prescribed above.

1. The evidence has not come to Petitioners' knowledge since the trial. Petitioners contended in their pleading entitled "Bill of Review" (a) that all parties mistakenly believed at the time of trial that the Building had a value in 1954 of $750,000; and (b) that all parties mistakenly believed at the time of trial that the Insurance Department had finally and irrevocably approved a valuation of $750,000.

As a matter of law neither contention is sustainable. Petitioners, themselves, introduced evidence at the trial that the value of the Building in 1954 was less than $750,000. Petitioners' witness, Harlan Sloan, testified that the actual cash market value of the Building in the summer of 1954 would not have been "in excess of $400,000." (S. F. 81-82) Petitioners vouched for this witness and his testimony. That testimony conclusively shows that Petitioners did not mistakenly believe at the time of trial that the Buildnig had a value of $750,000.

The Insurance Department Order of May 2, 1958, setting a value of $750,000, *expressly states* that such valuation is not final and irrevocable. Article 3.40, Texas Insurance Code, provides that Insurance Company realty may be appraised *at any time* when an examination of the company is being made. At the trial Petitioner Garrett Morris testified as follows:

> "Q: Is it quite possible, Mr. Morris, that the Commissioner will never determine what this Building is worth?

"A: Well, they are still questioning it.

"Q: It's quite possible they may never just make up their minds, isn't it?

"A: Yes, it's quite possible." (S. F. 256)

The foregoing conclusively shows that Petitioners did not mistakenly believe at the time of trial that the valuation approved by the Insurance Department in 1958 was final and irrevocable.

2. The evidence could have been discovered at or prior to the time of trial by the exercise of diligence. As pointed out in the trial of this cause, Petitioners have known for fourteen (14) years that the Building did not have the value Petitioners alleged or reasonably expected. (S.F. 221, 223, 226, 230) If Petitioners wanted to know more about its value, the Building could have been appraised at any time. Petitioners could have obtained and adduced additional evidence of value at the trial. In *Brannen v. City of Houston*, 153 S.W.2d 676 (Tex.Civ.App. 1941, writ ref.), the losing party sought relief by bill of review, claiming that he was ignorant of jury misconduct at the time he could have filed a motion for new trial. The Court denied the requested relief, stating at 153 S.W.2d 678:

> "The remedy for setting aside a jury's verdict for misconduct is to allege the facts constituting such misconduct in the motion for a new trial, and at the time the motion for a new trial is presented the hearing is had on the alleged misconduct of the jury. Appellant did not avail himself of such remedy. But there is no contention made that appellee in any way prevented appellant from availing himself of such remedy. It is

not pretended that appellee so much as knew of the alleged jury misconduct. Yet appellant is here asking that appellee be deprived of the vested right which it acquired in consequence of the judgment having become final. This vested right could be taken away from appellee only by a court of equity, *and the only ground for a court of equity setting aside a final judgment by a Bill of Review is by showing that appellant was prevented from making out his case by fraud, accident or the wrongful act of appellee, unmixed with any fault or negligence of his own.* Now the only excuse that appellant has for not availing himself of his legal remedy to set the verdict aside through his motion for new trial is that he was ignorant that the alleged misconduct had occurred, and that his attorneys were ignorant that the alleged misconduct had occurred. It is true that he attempts to excuse his failure to discover such misconduct on the ground that he was poor and infirm. But he makes it appear from his pleading that he had counsel who prepared and filed his motion for new trial. Their failure to discover and allege jury misconduct in the motion for new trial, as already pointed out, was not chargeable to appellee, and consequently appellee may in all good conscience retain the right vested in it by the judgment. In this connection, we quote as being here applicable this language from Smith v. Farrell, Tex.Com.App., 44 S.W. 2d 962, 966: 'If the judgment of Courts were liable to be set aside, and new trials granted on such grounds as these, there would, indeed, never be an end of litigation. It has been well said, that, "If mistakes in practice or inadvertence furnished reason for a new trial, it would encourage litigation and reward ignorance and carelessness

> at the expense of the other party." (6 Rep. 9.) And, therefore, the law in such cases wisely acts upon the maxim, Interest republicae ut sit finis litium—it is for the public good that there be an end of litigation.' " (Emphasis added.)

It does not help Petitioners to couch their "new evidence" contentions in terms of "mutual mistake." It is true that "where, through no fault of his own, a party has been prevented by fraud, accident, or mistake from prosecuting his suit or making his defense," the party may sometimes get relief by bill of review. 34 Tex.Jur.2d 19, Judgment, §188. But, the fraud or mistake must be based upon extrinsic rather than intrinsic facts; that is, it must be collateral to the issues actually tried and adjudicated. In *Ridge v. Wood*, 140 S.W. 2d 536 (Tex. Civ. App. 1940, writ dism., judg. corr.), the Court stated at 140 S.W. 2d 541-542:

> "Petitioners who seek, by an action in the nature of a bill of review, to set aside a judgment rendered at a former term of the court, and from which there was no appeal, cannot be heard to urge defenses that they could have presented in the former suit, unless upon a showing that they were there prevented from so doing by wrongful acts or conduct of the opposing party, recognized in equity as fraud or mistake; nor can such petitioners complain of judicial errors, however prejudicial, which could have been corrected on appeal.
>
> "Such judgment is conclusive as to all defenses which could have been raised, in the absence of extrinsic facts, such as fraud, accident or mistake, justifying relief."

Since the question of the value of the Insurance Building was before the Court at the initial trial, "new evidence" of value is not an extrinsic fact. Extrinsic facts are distinguished from intrinsic facts in 34 Tex.Jur.2d 48-51, Judgments, §205:

> "Fraud as bearing on the validity of a judgment is either intrinsic or extrinsic. However, the acts or conduct for which equity will annul a judgment rendered by a court of competent jurisdiction have relation to fraud extrinsic or collateral to the matter tried and not to fraud in the matter on which the judgment was rendered. By extrinsic fraud, as opposed to intrinsic fraud or fraud involved in the issues actually determined, is meant that fraud which deprived a party from either knowing about his rights or defenses, or from having a fair opportunity of presenting them at the trial. Thus, equity will not set aside a judgment because it was founded on a fraudulent assertion of rights by a cross-action, or for any matter that was actually presented and considered in giving the judgment.
>
> "A judgment will not be vacated for fraud when the particular fraud in question was actually or potentially an issue in the original proceeding."

A case distinguishing the mistake for which relief may be granted from the "new evidence" type mistake is *Metropolitan Life Ins. Co. v. Pribble*, 130 S.W. 2d 322 (Tex. Civ. App., 1939, writ ref.). In that case an insured had recovered judgment against an insurance company under a policy providing benefits where an insured had "become so disabled as a result of bodily injury or disease, as to be prevented permanently

from engaging in any occupation and performing any work for compensation or profit." A jury had found the insured disabled within the terms of the policy. In a new suit, the insurance company later sought to set aside the Judgment based upon mistake in the form of new evidence that the insured had re-entered the employment of his former employer, thus could not be disabled under the terms of the policy. The Court refused to set aside the original Judgment, stating at 130 S.W. 2d 338:

> "Neither fraud nor any facts showing accident were alleged by defendant as a ground for attacking the former judgment in any particular. The only ground of attack was the alleged mistake in the finding that as the result of his injury plaintiff had been totally and permanently disabled during the remainder of his life, within the meaning of the terms of his insurance policy; with the further ground added that plaintiff's resumption of work after rendition of the judgment, in the manner pleaded, conclusively showed that the finding in the former judgment, that plaintiff was totally and permanently disabled, was untrue.
>
> "That pleading was essentially an application for re-trial of the case on the ground of newly discovered evidence, discovered after the former judgment had been rendered and had become final on appeal. While a trial court may set aside a verdict and grant a new trial for newly discovered evidence, if the complainant shows reasonable ground for his failure to discover it earlier, that relief is not available in a suit in equity to set aside the judgment after it has become final. The mistake authorizing the vacation of a judg-

> ment by bill of review usually relates to matters incident to the trial in the lower court, which prevented a party defendant from making a valid defense on the trial, numerous instances of which are to be found in many authorities, such as 25 Tex.Jur., pp. 610-623, inclusive."

And at 130 S.W. 2d 336, the Court quoted with approval:

> " 'It is well settled that the decision of a court of competent jurisdiction is conclusive, not only as to the subject matter determined, but as to every other matter which the parties might have litigaed in the case and which they might have had decided. Danaher v. Prentiss, 22 Wis. [311] 316; Bates v. Spooner, 45 Ind. [489] 493; LeGuen v. Gouverneur, 3 Johns. Cas. 605 [1 Johns. Cas., 436, 506, 1 Am Dec. 121]; Shettlesworth v. Hughey, 9 Rich. [S. C.] 387. Or, as differently expressed, "the plea of res judicata applies not only to points upon which the court was actually required to pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, by exercising reasonable diligence, might have brought forward at the time." ' "

3. The evidence is merely cumulative. Two witnesses testified at the time of trial about the value of the Building. Petitioners' witness, Harlan Sloan, testified the Building had a value of $400,000 in 1954. (S.F. 80-82) Jenkins Garrett testified the Building had a value of $873,750 in 1953 and $650,000 in 1954. (S.F. 338; 349) Any further evidence of the value of the Building would obviously be cumulative. In effect,

Petitioners asserted in their "Bill of Review" that there is new evidence as to the *degree* of Petitioners' damages. The Supreme Court has held that "new evidence" of this type is merely cumulative and does not afford a basis for a new trial. *New Amsterdam Casualty Company v. Jordan*, 359 S.W. 2d 864 (Tex. 1962). In that case Plaintiff in a compensation case had recovered judgment based on jury findings of total incapacity for 55 weeks and partial incapacity for 75 additional weeks. At the time of trial Plaintiff had had one operation for his back injury. Original judgment was entered July 25, 1960. After judgment was entered, but prior to the expiration of the time for filing a motion for new trial, Plaintiff had a second back operation. As grounds for new trial, Plaintiff then urged that the second operation was new evidence proving that his temporary incapacity would extend longer than 75 weeks. The Trial Court denied the Motion for New Trial, and the Court of Civil Appeals reversed, holding that the Trial Court had abused its discretion in denying the Motion. The Supreme Court reversed the Court of Civil Appeals Judgment and affirmed the Trial Court Judgment, holding that the "new evidence" was merely cumulative. The Supreme Court stated at 359 S.W. 2d 867-868:

> "On the other hand, the after-trial evidence in the case at bar, consisting of a second back operation over three years after the injury, two years and nine months after the trial of the case, was not 'dissimilar to that used upon the trial' and was 'additional evidence of the same kind to the same point' as that introduced at the trial touching the question of respondent's incapacity. It is true that

> the second back operation was a new fact but it did not 'bring to light a new and independent truth,' and we do not think it can be said that respondent has not had his day in court or that the requirements for overriding the public policy requiring finality of trials have been met. Moreover, the evidence does not, in our opinion, partake of a conclusiveness and decisiveness upon the merits of the case to the extent of showing that justice has not been attained and that, as a matter of law, the trial court abused its discretion in denying the motion.
>
> "Apart, then, from the question of whether or not the post-trial facts alleged in the motion for a new trial were sufficiently established at the hearing (which we do not decide), we hold that the Court of Civil Appeals erred in reversing and remanding the case for another trial upon the ground of newly discovered evidence."

After the Supreme Court Judgment in *New Amsterdam*, supra, the Plaintiff had a *third* operation for his back injury. He then filed a bill of review asserting that the prior judgments were due to fraud, accident, or mistake, without negligence on his part, and that there had been a material change in his physical condition. Plaintiff contended fraud and mistake in that doctors had testified at his original trial that Plaintiff would not need further surgery. The Court of Civil Appeals refused to entertain the bill of review, *Jordan v. New Amsterdam Casualty Company*, 378 S.W. 2d 890, 893 (Tex. Civ. App. 1964, writ ref., n.r.e.), saying:

> "Thus it is seen that while the third operation is

a new factor or occurrence, it does not bring to light a new and independent truth. It was performed to relieve the same results of the injury, and pain in the same part of appellant's body generally, as the other two operations. Appellant's injury and incapacity, if we apply 'hindsight,' might possibly be shown to be greater now than anticipated during the trial in 1959, but no new and independent facts or truths are brought out which disassociate such incapacity and injury from the original injury and the first two operations and attendant consequences of the same. The mere fact that at the time the bill of review was filed appellant's physical condition may have deteriorated and it might be established that he was injured more severely than anticipated at the time of trial, would not be sufficient to set aside the final judgment rendered in 1959. Moreover, the evidence now relied upon by appellant is merely cumulative of that brought out at the trial in 1959, just as the evidence of the second operation adduced on the hearing of appellant's motion for new trial was cumulative with respect to his injury. The fact that the third operation was not at the same place on appellant's back does not prevent such evidence from being cumulative, since it was to relieve the same condition and pain that necessitated the first two operations."

4. The evidence is uncertain, inconclusive, and in fact, incompetent. The evidence is not material and would not conceivably change the result of the case. Evidence of the sales price of the Building in 1969 is not evidence of its fair market value in 1954. The Court cannot as contended by Petitioners, take judi-

cial notice that all buildings have increased in value since 1954, because they haven't done so. Obsolete buildings have become less valuable, and in some cases useless and a liability. Even if the evidence were competent, and tended to prove a $200,000 value in 1954, still the evidence would not be material. As the Trial Court and each appellate court has held, Petitioners have waived, and are estopped from asserting, any complaints based on value of the Building. Moreover, all courts have rejected Petitioners' claims based on misrepresentation and breach of implied warranty. Where there is no basis for a claim of misrepresentation or breach of warranty, what difference would it make if the parties had been mistaken about the value of the Building? All courts have held as a matter of law that (1) Respondents had no obligation to convey a Building of any certain value to Petitioners, and (2) Petitioners have waived, and are estopped to assert, any complaints concerning the value of the Building.

B.

Petitioners Have Already Been Afforded A Trial On Their Alleged Cause of Action

After judgment was rendered for Respondents in the second case, Petitioners then attempted to change their position, asserting that they were really suing on a new cause of action rather than seeking relief via bill of review. As grounds for such "new" cause of action, Petitioners assert that: (1) Respondents breached their 1953 contract with the Sloans and Bledsoe, because Respondents failed to deliver to the

Sloans and Bledsoe a building with an Insurance Department approved valuation of at least $900,000; and (2) Petitioners, as successors in the chain of title to the Insurance Building are entitled to assert the rights of the Sloans and Bledsoe.

The amazing fact is that there is nothing new about these allegations. Both allegations were made in the first case. The Court of Civil Appeals held in the first case that Respondents did not breach their contract with the Sloans and Bledsoe. The Court of Civil Appeals also held that Petitioners would have no standing to complain of the breach of a contract to which Petitioners were not a party, even if there had been a breach. The judgment in the first case is final. All appeals of that judgment have been exhausted. That judgment is res judicata of the claims now being asserted by Petitioners.

Petitioners speak of "a contract of a continuing nature," but Petitioners fail to state any basis for contending that Respondents' contract with the Sloans and Bledsoe was of a continuing nature. The contract contained no agreement by Respondents that the Insurance Department would approve in perpetuity a particular value for the Insurance Building. In fact, the contract contained no agreement that Respondents would *initially* deliver a building with a particular approved value. The contract merely gave the Sloans and Bledsoe an *option* to avoid the contract if the Insurance Department did not approve a particular value for the building prior to April 10, 1953. The Sloans and Bledsoe elected not to exercise the option.

The Court of Civil Appeals held in the first case that Petitioners were estopped to complain of the value of the Insurance Building. This estoppel holding is also res judicata of the claims now asserted by Petitioners.

C.

A "New" Cause of Action Would Be Barred By Limitations

Respondents in the first and second cases plead the two and four year statutes of limitation. Even if the judgment in the first case were not res judicata of the claims of Petitioners, Petitioners' claims of breach of a 1953 contract, asserted in 1969, are obviously barred by limitations as a matter of law.

CONCLUSION AND PRAYER

There being no constitutional questions raised in this case, and Petitioners' claims being clearly without merit, Respondents pray that Writ of Certiorari be denied.

Respectfully submitted,

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Attorney for Respondents

CERTIFICATE OF SERVICE

Three copies of the foregoing shall be personally delivered before April 26, 1971, to the Honorable Ernest May, Attorney for Petitioners, 1804 W. T. Waggoner Building, Fort Worth, Texas 76102.

Warren W. Shipman III

WARREN W. SHIPMAN III